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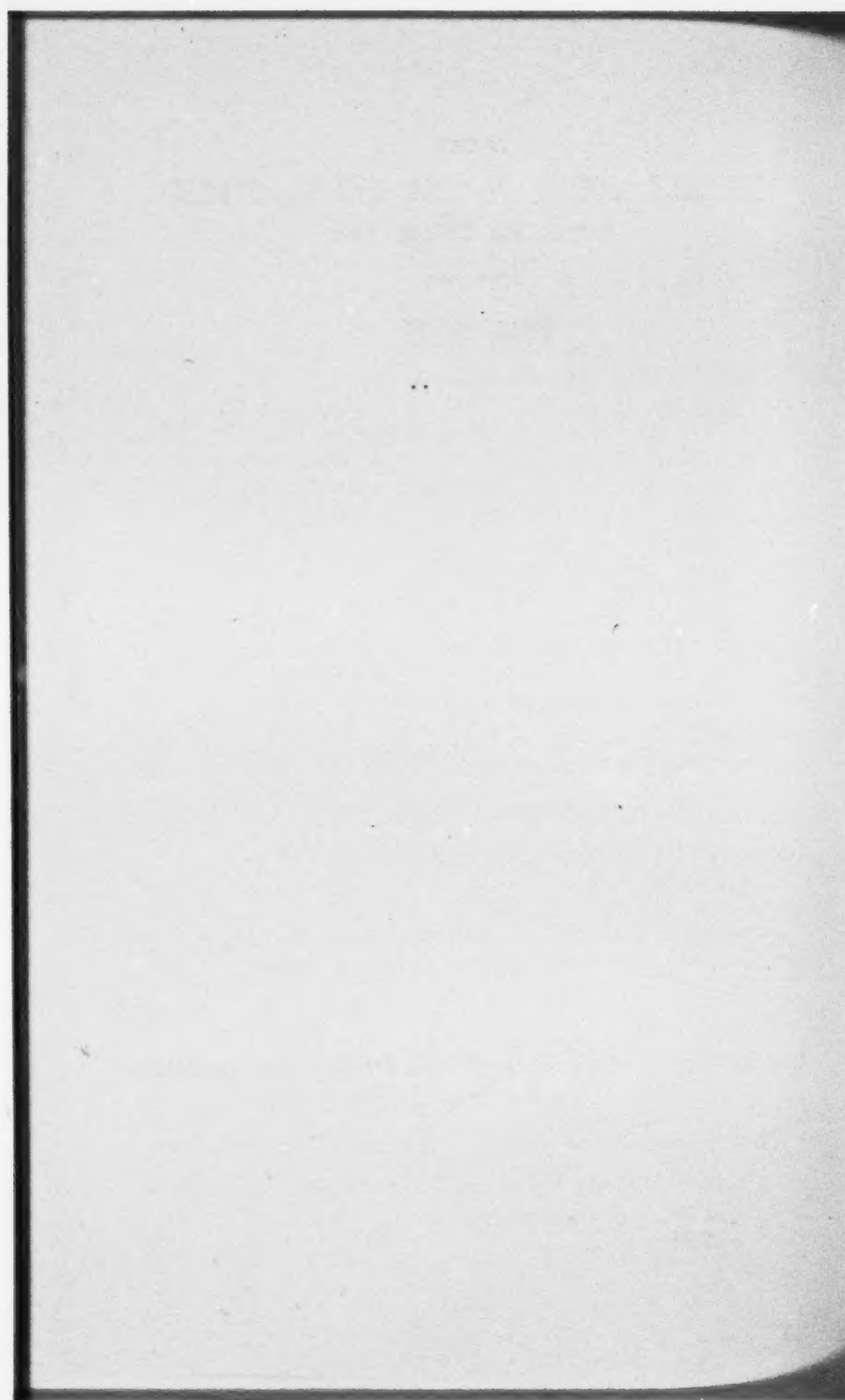
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

No. 510

JOHN W. TURNER, VIRGIL T. SEABERRY AND CARL
P. SPRINGER, CO-PARTNERS ENGAGED IN BUSINESS UNDER
THE FICTITIOUS NAME AND STYLE OF TURNER, SEABERRY &
SPRINGER,

Plaintiffs and Appellees,

vs.

JAMES DONOVAN,

Defendant and Appellant.

JURISDICTIONAL STATEMENT ON APPEAL.

Dist. Court of Appeal. Filed Aug. 24, 1942. J. E. Brown,
Clerk. J. W. Shenk, III, Deputy Clerk.

Comes now James Donovan, defendant and appellant, and
files his jurisdictional statement on appeal as follows:

I.

**The Provisions of the Code of Civil Procedure of the State
of California Involved in This Action.**

The Sections of the Code involved herein are as follows:

Sections 335 and 336 of the Code of Civil Procedure of
the State of California.

II.

A Statement of the Federal Questions Sought to be Reviewed and Raised, Methods in Which They Were Raised and the Way They Were Passed Upon by the Court.

(a) Defendant and appellant interposed by proper pleadings the defense of the statute of limitations. (See pages 5 and 18 of Clerk's Transcript.)

(b) The statute of limitations was again raised by defendant and appellant during the trial of the case when the judgment sued upon was offered in evidence and objections made thereto, which objections were as follows:

1. As incompetent, and

2. On the further ground that it appears on the face of said judgment that a right of action to recover thereon is barred by the statute of limitation as defined in subdivision 1, of Section 336 of the Code of Civil Procedure of the State of California in that more than five years have elapsed since the said judgment was rendered and entered.

(c) The trial court overruled the demurrer, overruled the objections and held that the statute of limitations did not apply. (See page 15 of Clerk's Transcript.)

(d) The District Court of Appeals of the Second Appellate District, Division Three, sustained the judgment of the trial court and in doing so followed the case of *Feeney v. Hinckley*, 134 Cal. 467. (See opinion hereunto attached and marked Exhibit A which was filed May 25, 1942.)

III.

The Questions Involved Affecting the Substantial Rights of the Defendant and All Litigants.

(a) The legislature of the State of California in passing Sections 335 and 336 of the Code of Civil Procedure gave to every defendant a substantial right, the right to plead the statute of limitations and to have the law in relation to the statute of limitations properly and judicially construed without any legislative action upon the part of the Court.

(b) The time in which the plaintiffs had in this action to bring suit to recover on the judgment was five years as defined by Sections 335 and 336 of the Code of Civil Procedure, *supra*.

(c) The judgment sued upon was rendered on October 13, 1931, and entered on October 15, 1931. Five years from that date would expire on the 15th day of October, 1936. The present action brought on that judgment was filed on December 30, 1939, which was three years, two months and fifteen days after the action had been barred by the statute of limitations as defined by Sections 335 and 336 of the Code of Civil Procedure and judgment was rendered against defendant James Donovan and entered on May 27, 1940, on which an appeal was taken to the District Court of Appeals of the Second Appellate District of the State of California, Division Three, being No. 12921.

(d) The District Court of Appeals decision here in question followed the decision rendered by Judge Henshaw in the case of *Feeney v. Hinckley*, 134 Cal. 467, and in doing so held that the statute of limitations had not run and therefore did not apply. Judge Henshaw in rendering the

decision in that case, in order to avoid the statute of limitations, used the following language:

“It is apparent at once that the statute requires construction, *and that something must be read into it by way of interpretation.*” (Italics ours.)

(e) A decision which violates the constitutional rights of a party to an action should never be followed by any court. When the District Court of Appeals of the Second Appellate District, that rendered its decision in this case, followed the *Feeney v. Hinckley, supra*, it committed just as grave an error as Judge Henshaw and violated the provisions of the Constitution of the United States by depriving defendant and appellant herein of his substantial rights to-wit, to have the statute of limitations correctly applied and also in their failure to so correctly apply the statute of limitations again violated the constitutional rights of defendant and appellant in depriving him of his property without due process of law.

(f) When a court reads into a statute or provision of the code language which is not there, it violates the provision of Article III of the State Constitution and the provisions of the Constitution of the United States in that it is assuming legislative power and authority which is by the Constitution of the State and the United States prohibited, and a Federal question then arises immediately.

(g) The decision of the District Court of Appeals herein sought to be appealed from and reviewed by this Court followed in the footsteps of Judge Henshaw and violated the provisions of the State Constitution and the Constitution of the United States in depriving defendant and appellant of his substantial right to have the statute of limitations applied and considered as a complete defense to the action and if allowed and permitted to stand will deprive the de-

fendant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(h) If the legislature created a difficulty regarding the statute of limitations it and it alone has the power to provide a remedy and the courts cannot assume or insert on that account something that the legislature may have failed to admit or to have intended to include. Chief Justice Marshall of this Court in 1817 in the case of *McIver, Lessees, et al. v. Ragan, et al.*, reported in 2 Wheaton, page 30, in construing a similar situation to the one included herein used the following language:

“If this difficulty be produced by the legislative power, the same power might provide a remedy; *but courts cannot on that account, insert in the statute of limitations an exception which the statute does not contain.*” (Italics ours.)

Sections 335 and 336 of the Code of Civil Procedure of the State of California read as follows:

“335. Periods of limitation prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

336. Within five years. Within five years:

1. An action upon a judgment or decree of any court of the United States or of any state within the United States.

2. An action for mesne profits of real property.”

(i) Sections 335 and 336 of the Code of Civil Procedure, *supra*, need to have nothing read into them in order to enable a court to correctly construe and apply the statute of limitations nor is it necessary to insert therein a meaning not intended by the legislature, nor was it or is it neces-

sary for the Court in violation of the Constitution of the State and the Constitution of the United States to exercise the functions of the legislature in order to give full force and effect to the statute of limitations above set forth.

(j) When a decision of any appellate court has been rendered that violates the Constitution of the State and the Constitution of the United States, it should not be followed thereafter. To follow such a decision does not correct the error first committed, and in doing so a federal question of substance was thereupon decided by the District Court of Appeals which has not theretofore been determined by this Court.

Assignment of Errors.

1. The trial court erred in admitting in evidence the judgment sued upon over the objections of the defendant and appellant. (See page 4 of Petition herein.)

2. The District Court of Appeal erred in holding and deciding that Section 336 of the Code of Civil Procedure of the State of California did not apply and that the statute had not run because the appeal taken from said judgment tolled the statute.

3. Sections 335 and 336 of the Code of Civil Procedure of the State of California are short, concise, definite and certain as they state in language that cannot be misunderstood or misconstrued that an action on a judgment cannot be maintained after the expiration of five years. A judgment of a court becomes a judgment the moment it is signed by the court and entered. There are no provisions in Section 335 or 336 of the Code of Civil Procedure of the State of California which justify any court in holding that the statute of limitations does not begin to run upon the rendi-

tion and entry of the judgment if an appeal is taken as there are no provisions in either Section that taking an appeal tolls the statute.

4. To hold that the statute of limitations is tolled by the taking of an appeal constitutes legislation upon the part of the court which it has no jurisdiction, authority or power to do.

5. To read into the Sections, as Judge Henshaw did, something which is not there, is exceeding the jurisdiction and power of the court and assumes legislative functions which not only are not granted by the Constitution but prohibited.

6. It deprives the defendant and appellant of his right of defense and his right to rely upon the statute of limitations.

7. It takes from him his property without due process of law in violation of the Constitution and Amendments of the Constitution of the United States.

WHEREFORE, defendant and appellant herein respectfully submits that he has shown the manner in which the federal questions are sought to be reviewed by this Court, were raised, the method of raising them, and that the questions affect the substantial rights of the defendant and appellant and all litigants. The decision of the District Court of Appeal of the Second Appellate District, Division Three, has involved the Constitution of the United States and the substantial rights of defendant and appellant.

Respectfully,

L. E. DADMUN,
Attorney for Defendant and Appellant.